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Ji Zhan Capital Sdn Bhd v Chua & Chew Sdn Bhd

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HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO JA-11BNCVC-18–09 OF 2019
AWANG ARMADAJAYA JC
9 JUNE 2020

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Civil Procedure — Action — Discontinuance of — Application for discontinuance of action with liberty to file afresh — Court allowed application but without liberty to file afresh — Whether learned magistrate erred in law and in fact when allowing discontinuance of action but without liberty to file afresh — Rules of Court 2012 O 21

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This was an appeal pursuant to O 55 r 5 of the Rules of Court 2012 ('the ROC') against the decision of the learned magistrate who partially allowed the application by the appellant ('plaintiff') to withdraw the writ of summons ('the writ') as well as the statement of claim without liberty to file afresh. The plaintiff filed the writ and the magistrates court had given pre-trial management directives and the matter was set down for full trial on 20 and 21 May 2019. Among the directives were the instructions that documents were to be prepared and filed before the trial dates. The plaintiff instructed the plaintiff's previous solicitors that the plaintiff wished to appoint new solicitors to handle the case. The plaintiff's previous solicitors filed an application to discharge themselves as solicitors acting for the plaintiff. The magistrates court allowed the discharge and vacated the trial dates and adjourned them to other dates. However, by way of a letter, the plaintiff informed the court that the plaintiff intended to withdraw the writ action due to logistics reasons and sought adjournment of the trial dates. On 4 July 2019, new solicitors were appointed to act on behalf of the plaintiff. On 8 July 2019, the plaintiff filed a notice of application to withdraw the writ action with liberty to file afresh pursuant to O 21 r 3 of the ROC. The defendant agreed to the withdrawal but not the condition attached to the application, namely 'the liberty to file afresh'. The plaintiff informed the court that the previous solicitors did not file documents in support of the plaintiff's case and hence the plaintiff was at a disadvantage. The learned magistrate allowed the application for discontinuance of the writ of summons but not with liberty to file afresh. Hence, this appeal.

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Held, dismissing the appeal with costs:

(1) The plaintiff was indeed a *dominus litis*, and had undue advantage, having seen all the defendant's cards on the table. To allow the plaintiff,

withdrawal with liberty to file afresh, meant that the plaintiff may make good, any earlier deficiency in his case, much to the disadvantage of the defendant because in a new trial, all pleadings were fresh and the parties were not bound to follow the pleadings of the earlier trial (since discontinued), much less leave of court. The defendant on the other hand, would have to wait until the new statement of claim was served on them to know what they need to reply to, putting them at a tactical disadvantage. The learned magistrate was right in her decision. There was no appealable error in the decision of the learned magistrate (see paras 42–46).

[Bahasa Malaysia summary

Ini adalah rayuan menurut A 55 k 5 Kaedah-Kaedah Mahkamah 2012 ('Kaedah tersebut') terhadap keputusan majistret yang bijaksana yang membenarkan sebahagian permohonan oleh perayu ('plaintif') untuk menarik balik writ saman ('writ') serta pernyataan tuntutan tanpa kebebasan untuk memfailkan semula. Plaintif memfailkan writ tersebut dan mahkamah majistret telah memberikan arahan pengurusan pra-perbicaraan dan perkara itu ditetapkan untuk perbicaraan penuh pada 20 dan 21 Mei 2019. Antara arahannya adalah arahan bahawa dokumen harus disiapkan dan difailkan sebelum tarikh perbicaraan. Plaintif mengarahkan peguam plaintif terdahulu bahawa plaintif ingin melantik peguam baru untuk menangani kes tersebut. Peguam plaintif terdahulu mengemukakan permohonan untuk melepaskan diri sebagai peguam yang bertindak untuk plaintif. Mahkamah majistret membenarkan pelepasan dan mengosongkan tarikh perbicaraan dan menangguhkannya ke tarikh lain. Namun, melalui surat, plaintif memberitahu mahkamah bahawa plaintif berniat menarik balik tindakan writ kerana alasan logistik dan memohon penangguhan tarikh perbicaraan. Pada 4 Julai 2019, peguam baru dilantik untuk bertindak bagi pihak plaintif. Pada 8 Julai 2019, plaintif memfailkan notis permohonan untuk menarik balik tindakan writ dengan kebebasan untuk memfailkan semula mengikut A 21 k 3 Kaedah tersebut. Defendan bersetuju dengan penarikan tetapi bukan terhadap syarat yang dilampirkan dalam permohonan itu, iaitu 'kebebasan untuk memfailkan semula'. Plaintif memberitahu mahkamah bahawa peguam sebelumnya tidak memfailkan dokumen untuk menyokong kes plaintif dan oleh itu plaintif berada dalam kekurangan. Majistret yang bijaksana membenarkan permohonan pemberhentian writ saman tetapi tidak dengan kebebasan untuk memfailkan semula. Oleh itu, rayuan ini.

Diputuskan, menolak rayuan dengan kos:

(1) Plaintif sememangnya *dominus litis*, dan mempunyai kelebihan yang tidak wajar, setelah melihat semua kedudukan defendan. Untuk membenarkan plaintif, penarikan dengan kebebasan untuk memfailkan semula, ia bermaksud bahawa plaintif dapat membuat pembaikan,

kekurangan sebelumnya dalam kesnya, sangat merugikan defendan kerana dalam perbicaraan baru, semua pliding adalah baru dan pihak-pihak tidak terikat untuk mengikuti pliding perbicaraan sebelumnya (kerana dihentikan), apatah lagi kebenaran mahkamah. Sebaliknya, defendan harus menunggu sehingga pernyataan tuntutan yang baru disampaikan kepada mereka untuk mengetahui apa yang perlu mereka balas, dan meletakkan mereka pada kelemahan taktikal. Majistret yang bijaksana betul dalam keputusannya. Tidak ada kehilafan yang boleh dirayu dalam keputusan majistret yang bijaksana (lihat perenggan 42–46).]

Cases referred to

Anil Kumar Singh v Shivnath Mishra (1995) 3 SCC 147, SC (refd)
Fox v Star Newspaper Company [1898] 1 QB 636, CA (refd)
Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155, CA (folld)
Mann v O'Neill (1997) 191 CLR 204, HC (refd)
Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd [2017] MLJU 671, CA (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [2000] 1 CLJ 503, CA (refd)
O'Neal v Mann [2000] FCA 1680, FC (refd)
O'Neal v Mann (1994) 54 FCR 212, FC (refd)
O'Neill v Mann (1994) 49 FCR 370, FC (refd)
O'Neill v Mann [2000] FCA 1180, FC (refd)
Overseas Union Finance Ltd v Lim Joo Chong [1971] 2 MLJ 124 (refd)
Ramesh Hirachand Kundammal v Municipal Corporation of Greater Bombay [1992] 2 SCR 1 (refd)
Razia Begum v Sahebzadi Anwar Begum & Others [1959] SCR 1111, SC (refd)

Legislation referred to

Code of Civil Procedure [IND] O 1 r 10, 10(2)
Federal Court Rules [AUS] O 22 r 2, O 62 r 3(3)
Jurisdiction of Courts (Cross-Vesting) Act 1987 [AUS] s 5
Rules of Court 2012 O 21, O 21 rr 2, 3, O 55 r 5

Azmi Azahar (Tan Vincent & Azmi) for the appellant.
David Soosay (Yeow & Chin) for the respondent.

Awang Armadajaya JC:

INTRODUCTION

[1] This is an appeal pursuant to O 55 r 5 against the decision of the learned magistrate given on 21 August 2019 who partially allowed the application (pursuant to encl 26) by the appellant/plaintiff to withdraw the writ of

summons (encl 1) as well as the statement of claim (encl 2) without liberty to file afresh. The writ of summons and statement of claim against the respondent/defendant was for alleged professional negligence in the filing for tax returns with the Inland Revenue Board ('Lembaga Hasil Dalam Negeri' which is known by its acronym 'LHDN').

BACKGROUND FACTS

[2] The plaintiff filed the writ of summons ('writ') on 29 October 2018. The magistrates court gave pre-trial management directives on 21 March 2019 and the matter was set down for full trial on 20 and 21 May 2019. Among the directives were the instructions that documents are to be prepared and filed before the trial dates. The documents are:

(a) bundle of pleadings;

(b) the plaintiff's bundle of documents;

(c) the defendant's bundle of documents;

(d) the defendant's case summary;

(e) the plaintiff's case summary;

(f) agreed facts;

(g) contentious issues;

(h) list of plaintiff's witnesses;

(i) list of defendant's witnesses;

(j) defendant's witness statement; and

(k) plaintiff's witness statement.

[3] By way of a letter dated 30 April 2019, the plaintiff instructed the plaintiff's previous solicitors (Messrs Elyas Majeed & Co) that the plaintiff wishes to appoint new solicitors to handle the case.

[4] As of 13 May 2019, the plaintiff's previous solicitors has not receive any notification of appointment of new solicitors.

[5] Since there was only seven days left before the commencement of the trial, the plaintiff's previous solicitors filed an application to discharge themselves as solicitors acting for the plaintiff.

[6] The magistrates court allowed the discharge and vacated the trial dates and adjourned them to 26 June and 27 June 2019. However, by way of a letter

dated 30 May 2019, the plaintiff (unrepresented) informed the court that the plaintiff intended to withdraw the writ action due to logistics reasons and sought adjournment of the trial dates.

[7] On 4 July 2019, new solicitors were appointed to act on behalf of the plaintiff. On 8 July 2019, the plaintiff filed a notice of application to withdraw the writ action with liberty to file afresh pursuant to O 21 r 3 (encl 26). The defendant agreed to the withdrawal but not the condition attached to the application, namely 'the liberty to file afresh'.

[8] In the affidavit-in-support by the plaintiff to support the application for discontinuance pursuant to encl 26, the plaintiff informed the court that the previous solicitors did not file documents in support of the plaintiff's case and hence the plaintiff is at a disadvantage. No detail was given on what these documents were (learned magistrates grounds of judgment, encl 9, p 112 para 10.1)

[9] The application pursuant to O 21 r 3 (encl 26) was heard by the learned magistrate on 14 August 2019 and the learned magistrate delivered the ruling on 21 August 2019 whereby the learned magistrate allowed the application for discontinuance of the writ of summons but not with liberty to file afresh and the plaintiff to pay cost of RM2,000 to the defendant.

THIS APPEAL

[10] The essence of this appeal is that the learned magistrate was said to have erred in law and in fact when she allowed the discontinuance of the action but without liberty to file afresh. *Newlake Development Sdn Bhd v Zenith Delight Sdn Bhd* [2017] MLJU 671 was cited in support.

[11] We reproduced O 21 of the Rules of Court 2012 for easy reference.

> 21 Withdrawal and discontinuance
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> 1Withdrawal of appearance (O 21 r 1)
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> A party who has entered an appearance in an action may withdraw the appearance at any time with the leave of the Court.
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> 2 Discontinuance of action without leave (O 21 r 2)
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> (1) The plaintiff in an action begun by writ may, without the leave of the Court, discontinue the action or withdraw any particular claim made by him therein, as against any or all of the defendants at any time not later than fourteen days after the service of the defence on him or, if there are two or more defendants, of the defence last served, by serving a notice in Form 32 to that effect on the defendant concerned.
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> (2) A defendant may, without the leave of the Court:
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> (a) withdraw his defence or any part of it at anytime; or

(b) discontinue a counterclaim, or withdraw any particular claim made by him therein, as against any or all of the parties against whom it is made, at any time not later than fourteen days after:

(i) the service on him of a defence to the counterclaim; or

(ii) if the counterclaim is made against two or more parties, of the defence to the counterclaim last served on him, by serving a notice in Form 32 to that effect on the plaintiff or any other party concerned.

(3) Where there are two or more defendants to an action and not all of them serve a defence on the plaintiff, and the period fixed by or under these Rules for the service of the defence by any of those defendants expires after the latest date on which any other defendant serves his defence, paragraph (1) shall have effect as if the reference therein to the service of the defence last served were a reference to the expiration of that period. This paragraph shall apply in relation to a counterclaim as it applies in relation to an action with the references to a defence, to the plaintiff and to paragraph (1) substituted with the references to a defence to the counterclaim, to the defendant and to paragraph (2) respectively.

(4) If all the parties to an action consent, the action may be withdrawn without the leave of the Court at any time before trial by producing to the Court a written consent to the action being withdrawn duly signed by all the parties.

3 Discontinuance of action with leave (O 21 r 3)

(1) *Except as provided bv rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs. the bringing of a subsequent action or otherwise as it thinks just.*

(2) An application for leave under this rule shall be made by a notice of application.

4 Effect of Discontinuance (O 21 r 4)

Subject to any terms imposed by the Court in granting leave under rule 3, the fact that a party has discontinued an action or counterclaim or withdrawn a particular claim made by him therein shall not be a defence to a subsequent action for the same, or substantially the same, cause of action.

5 Stay of subsequent action until costs paid (O 21 r 5)

(1) Where a party has discontinued an action or counterclaim or withdrawn any particular claim made by him therein and he is liable to pay any other party's costs of the action or counterclaim or the costs occasioned to any other party by the claim withdrawn, then, if before the payment of those costs, he subsequently brings an action for the same or substantially the same cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid.

(2) An application for an order under this rule may be made by a notice of application.

6 Withdrawal of notice of application (O 21 r 6)

A party who has taken out a notice of application in a cause or matter may not withdraw it without the leave of the Court. A

[12] In *Newlake Development Sdn Bhd v Zenith Delight sdn Bhd* [2017] MLJU 671, the facts were that, the claim by the plaintiff against the defendants was premised on, inter alia, breach of trust and conspiracy over a non-existent land deal. The plaintiff claimed that it had paid RM9m in deposit for a land transaction to the second defendant, a law firm. The third defendant is the managing partner of the second defendant. During case management on 4 December 2015, the plaintiffs newly appointed counsel made an oral application to withdraw the suit 'with liberty to file afresh'. The defendants' counsel had no objections to the withdrawal of the suit but insisted that the withdrawal shall be 'with no liberty to file afresh'. B C

[13] Her Ladyship, Justice Zabariah Mohd Yusof made the following observations, D

Before granting the order for discontinuance of an action, the court must be satisfied that:

(i) *if a defendant is dominus litis, the general rule is to refuse leave to discontinue (see Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124*)*; E

(ii) *the case is not at an advanced stage; if so, care must be taken not to permit discontinuance. What constitutes an advanced stage depends on the facts and circumstances of the case (see Fox v Star Newspaper Company* [1898] 1 QB 636; F

(iii) the plaintiff may have gained an interim interlocutory advantage between the date of issue of the writ and the point of time he seeks to discontinue (*O'Neal v Mann* [2000] FCA 1680*)*;

(iv) there is no miscarriage of justice occasioned by its refusal to permit the discontinuance; G

(v) it will not prejudice the opponent to the application or take away from him any advantage to which he is fairly and reasonably entitled.

[14] In *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124, His Lordship Justice Raja Azlan Shah (as His Majesty then was) had the occasion to deal with the issue of when to allow discontinuance of an originating summons filed by the chargee bank, whereby His Lordship held as follows: H

However, it is at my discretion whether I should allow discontinuance. Guidelines to the discretion can be found in the *Annual Practice 1963* at p 593 under the heading before judgment which reads: I

Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him.

A If the applicant is *dominus litis*, then leave to discontinue may be granted. If he is not then it is unlikely that I would grant him leave to discontinue. I do not think that the applicant is wholly *dominus litis*. He cannot dispose of the case as he thinks fit or allow it to be dismissed or let judgment go by default. *The parties have come to a stage where the respondent chargor has gained an upper hand by an advantage in that he could* B *find flaws in the applicant/chargee's allegation namely the wrong dates in the memorandum etc and the fact that the reason for wanting a discontinuance is not a very strong one. The respondent/chargor is not to be deprived of these advantages which have made him a well matched adversary in the arena.*

Having considered all the points, I am of the opinion that the application to discontinue C *should be dismissed.* (Emphasis added.)

[15] In *Guide to Latin in International Law* (Oxford University Press Print Publication date: 2009 Print ISBN-13: 9780195369380), the definition of 'dominus litis' is defined as 'Lord of the lawsuit'.

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[16] In the *Dictionary and Digest of the Law of Scotland*, by William Bell Esq, advocate, 'dominus litis' is defined as 'is a person to whom the suit belongs, who derives the benefit of a favourable and is liable to the effects of an adverse judgment. One may be *dominus litis*, although his name be not in a suit as E either pursuer or defender. Thus, a father is subjected in the expense of a process, which has been awarded against his son, in respect that, although not himself the party, he had undertaken to defend his son, and had not allowed himself a sufficient aliment; Stevens 21 Nov 1823, 2 S & D 507 ... .

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[17] Order 21 of the Rules of Court 2012 allows a party to withdraw or discontinue a civil suit. Based on O 21 r 2, if the suit is at its infancy, ie parties are still in the midst of exchanging pleadings, then a party can discontinue its claim without the leave of court.

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[18] For cases where the pleadings for the civil suit has closed and/or exhausted, the plaintiff can only withdraw his suit with the leave of court. This is provided for in O 21 r 3.

H **[19]** In general, the courts will grant leave subject to an award of costs to reflect the costs incurred by the other party in defending the action.

[20] However, the courts will not grant leave to discontinue in the following situations:

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(a) the defendant has obtained an advantage and has now become the dominant party (*dominus litis*) in the said civil suit;

(b) the case is already at an advanced stage, ie all documents are completed and parties are just waiting for trial; and

(c) the plaintiff has gained an advantage by way of an interlocutory or interim order from the moment the suit was filed until the application to withdraw. An example of this will be in situations where the plaintiff has obtained an injunction against the defendant which is in force until the conclusion of the suit.

[21] The term 'dominus litis' is Latin phrase which means 'the master of the suit'. To say aptly, the person who was really and directly interested in the suit as a party, as distinguished from his attorney or advocate. It is for the plaintiff in a suit, to identify the parties against whom he has any grievance and to implead them as defendants in the suit filed for necessary relief. He cannot be compelled to face litigation with the persons against whom he has no grievance. Where, however, any third party is likely to suffer any grievance, on account of the outcome of the suit, he shall be entitled to get himself impleaded. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being *dominus litis*, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff.

[22] In *Ng Hee Thoong & Anor v Public Bank Bhd* [2000] 1 CLJ 503, the notice of demand was not properly issued to the guarantor. However, the bank did not discontinue the action after discovering the improper issuance of the notice of demand. The bank instead sought summary judgment after the defendant guarantor successfully set aside the default judgment obtained against him. In the High Court, the bank was successful in obtaining the summary judgment but was reversed on appeal. The Court of Appeal ordered the matter to be set down for trial. At the High Court, instead of proceeding with the full trial as ordered by the Court of Appeal, the bank applied to discontinue the action with liberty to file afresh. The High Court allowed the application. The Court of Appeal allowed the appeal in part. The Court of Appeal granted leave to discontinue on the following term:

> ... gave leave to the respondent to discontinue on the terms that no fresh action should be brought on the same cause of action based on the same or substantially the same factual situation ...

[23] His Lordship Justice NH Chan further explained:

> *A perusal of the learned iudge's grounds of judgment would show that the learned judge had failed to consider the prejudice and the disadvantage contended to have been suffered by the appellants and the fact that the appellants would be deprived of a defence which was available to them if an order in terms of the said application was granted*. The learned judge had thereby, in the words of Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22 (referred to above) 'excluded matters that it ought to have taken into account'. Consequently, we have allowed the appeal with costs and set aside the

order of the High Court. (Emphasis added.)

[24] Her Ladyship, Justice Zabariah in *Newlake Development Sdn Bhd* explained 'It has not been shown in the present appeal that the discontinuance was not made bona fide by the plaintiff but was made so as to obtain an advantage to which he has no right to retain since he has become *dominis litis* as the defendant has a good defence'.

[25] This principle found traction in *Fox v Star Newspaper Company* [1898] 1 QB 636, with Lord Justice Chitty stated as follows:

> *The principle of the rule is plain. It is that after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into court, shall not be able to escape by a side door and avoid the contest. He is then to be no longer dominus litis, and it is for the judge to say whether the action shall be discontinued or not and upon what terms. I think it would be a great error to construe the rule by reference to the old meaning of the term 'discontinuance' or any mere technical sense of words. The substance of the provision is that, after a stage of the action has been reached at which the adversaries are meeting face to face, it shall only be in the discretion of the judge whether the plaintiff shall be allowed to withdraw from the action so as to retain the right of bringing another action for the same subject matter.*

[26] In *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan* [2002] 3 MLJ 155. Here, the Court of Appeal, speaking through Justice Gopal Sri Ram (as he then was), stated as follows:

> ... a judge exercising his power under O 21 r 3 which permits discontinuance has a wide discretion. But it is not an unprincipled discretion. There are important guidelines that act as beacons, guiding him through those blurred areas of which we spoke a moment ago.
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> One of these guidelines is that if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue. See *Overseas Union Finance Ltd v Lim Joo Chong* [1971] 2 MLJ 124. Another guideline is that where the case is at a very advanced stage, care should be taken not to permit discontinuance. And what constitutes an advanced stage depends on the facts and circumstances of each case as illustrated by the case of *Fox v Star Newspaper Company* [1898] 1 QB 636. Another consideration; yet another guideline; which a judge ought to bear in mind is any interim or interlocutory advantage that the plaintiff may have gained between the date of issue of the writ and the point of time which he seeks to discontinue: *O'Neal v Mann* [2000] FCA 1680.

[27] The principles of law that may be deduced from the above are:

(a) a judge hearing an application for withdrawal has a wide discretion;

(b) if the defendant is *dominus litis*, withdrawal should be refused;

(c) cases at an advanced stage should not be allowed to withdraw;

(d) any advantage obtained by a plaintiff (eg, an interlocutory injunction) ought to be considered by the judge; and

(e) a judge should consider the expense and extent to which a defendant has defended a claim (at p 162).

[28] In *O'Neal v Mann* [2000] FCA 1680, though in form an application for leave to discontinue a defamation proceeding of over eleven years standing the present matter is in substance one about costs. The applicant, James Joseph O'Neill, had a costs order made in his favour by the full court of this court against the respondent, Arnold Mann, in an interlocutory hearing in this proceeding on a preliminary question of law: *O'Neal v Mann* (1994) 54 FCR 212. No order has, as yet, been made for the taxation of those costs: see Federal Court Rules O 62 r 3(3) ('the rules'). The substantial issue between the parties is whether Mr O'Neill should enjoy the dual advantages of discontinuing for no given reason a proceeding he initiated and of being permitted to enjoy the benefits of his costs award.

[29] The factual background was that in November 1989 Mr O'Neill commenced a defamation action against Dr Mann. Dr Mann, a medical practitioner, had been a defendant in two cases that had come before Mr O'Neill in his then capacity as a special magistrate of the Australian Capital Territory ('ACT'). The alleged defamation related to several letters written by Dr Mann to public officials that reflected on Mr O'Neill's competence.

[30] The Supreme Court proceeding was cross-vested to this court by consent on 18 February 1994 under the provisions of s 5 of the Jurisdiction of Courts (Cross-Vesting) Act 1987 ('the Cth'). In *O'Neill v Mann* [2000] FCA 1180 I held that there was no constitutional impediment to this court's jurisdiction to entertain that matter.

[31] In the defamation action Dr Mann raised defences both of absolute and of qualified privilege. Whether the former of these was available was tried by Heerey J as a separate question, seemingly, by consent. It was decided favourably to Dr Mann: *O'Neill v Mann* (1994) 49 FCR 370. The full court by majority reversed that decision in *O'Neill v Mann* (1994) 54 FCR 212. It ordered that the absolute privilege plea be struck out and, of present significance, that Dr Mann pay the costs of the appeal and Mr O'Neill's costs of the separate question at first instance. Dr Mann appealed to the High Court against these orders. By a majority (4:1), the appeal was disallowed: *Mann v O'Neill* (1997) 191 CLR 204.

[32] On 5 February 1998 Mr O'Neill through his solicitors purported to discontinue the proceeding by filing a notice to that effect in the ACT District Registry of the court. The notice was ineffective, the required leave of the court not having been obtained: O 22 r 2 of the rules. Nonetheless Mr O'Neill's solicitors proceeded on the assumption that it had achieved its object and on 15 December 1998 filed a bill of costs for taxation in respect of the full court's costs order to which I have referred, again without the required order of the court: O 62 r 3(3) of the rules. That action spawned further litigation between the parties.

[33] Dr Mann challenged on constitutional grounds the jurisdiction of this court to entertain the cross-vested defamation action. He was unsuccessful: *O'Neill v Mann* [2000] FCA 1180. It was that proceeding that brought to light the ineffective notice to discontinue.

[34] Mr O'Neill's legal representatives foreshadowed that if he was successful in resisting the constitutional challenge, he would seek the leave of the court to the discontinuance of the defamation proceeding. Though no motion to that effect has been filed and no evidence put on to support the grant of leave, the parties have proceeded on the assumption, that the present hearing was for such leave.

[35] Justice Finn made these observations:

> 11 (1) Order 22 r 2 of the rules specifies the circumstances in which a party making a claim for relief may discontinue the whole or any part of that claim: (a) without the leave of the court or the consent of any other party; (b) with the consent of any or all of the parties; and (c) with the leave of the court. Subject to a qualification I will note below, where the leave of the court is sought:
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> *the court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved*: *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876 at p 879.
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> The qualification is that inability completely to protect a respondent will not in all circumstances result in leave being refused. The matter remains one for the exercise of the court's discretion in each case: *SCI Operations pty ltd and Another v Trade Practices Commission and Others* (1984) 53 ALR 283. The common device employed to protect a respondent is the imposition of terms on an applicant as a condition of the grant of leave: see eg *Young, Austen and Young Ltd v British Medical Association* [1977] 1 WLR 881. Those terms may be so onerous that an applicant for leave may not wish to accept them: *Covell Matthews & Partners v French Wools Ltd* [1978] 1 WLR 1477 at p 1485.

12 (2) In relation to the incidence of costs on discontinuance, in the first two of the three categories referred to above (ie discontinuance without leave or consent and discontinuance with consent), it has been held that, unless the court otherwise orders, the discontinuing party is liable to pay the costs occasioned by the discontinued claim of the person(s) against whom that claim was made and which were incurred before service of the notice of discontinuance: see *Ahmed v Minister for Immigration and Multicultural Affairs* [2000] FCA 1436. This conclusion is a consequence of the combined effect of O 22 rr 2 and 3 and O 62 r 26(1) of the rules. The costs consequences to a discontinuing party where leave is required and granted is somewhat more complex. Unlike with the previous two categories, the rules do not provide expressly for the incidence of costs on discontinuance with leave, the court's power to award costs being that general one provided by s 43(1) of the Federal Court of Australia Act 1976 ('the Cth') and O 62 r 3(1) of the rules. It is a discretionary power to be exercised judicially: *Mineralogy PTY Ltd v National Native Title Tribunal* (full court of the Federal Court, 23 December 1998, unreported).

13 (3) It properly can be said that there is an 'underlying policy' in the rules that the discontinuing party should be liable for the other party's costs unless the court orders otherwise: *Grundy v Lewis* (Cooper J, 28 May 1998, unreported). But so various can be the reasons for, and circumstances of, discontinuance that that policy cannot safely be said to have hardened into a 'usual rule' where leave is granted such as exists where there has been a determination of a claim on its merits: as to the latter see *Re Wilcox; Ex parte Venture Industries Pty Ltd (No 2)* (1996) 141 ALR 727. The conduct of the parties in the matter and the reasons for the discontinuance can bear heavily on the exercise of the discretion as to costs. As McHugh J observed in *Re Minister for Immigration and Ethnic Affairs;* (1997) 186 CLR 622 at p 625 of one common category of case:

> [I] if it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.
>
> In applying this approach it is not the function of a court to make a prediction as to the outcome of a hypothetical case. And so in *Mineralogy PTY Ltd v National Native Title Tribunal*, above, no order as to costs was made where an appeal was discontinued in consequence of an amendment to the Native Title Act 1993 ('the Cth') that arguably altered the effect on the discontinuing appellant of the judgment appealed against: see also *Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194. By way of contrast, where the discontinuance can be said to be an acknowledgment by an applicant of likely defeat or where no objective circumstance provides reason for the discontinuance, a costs order in favour of the other party will ordinarily be made.

14 (4) Order 62 r 3(3) of the rules provides:

An order for costs of an interlocutory proceeding shall not, unless the court otherwise

orders, entitle a party to have a bill of costs taxed until the principal proceeding in which the interlocutory order was made is concluded or further order.

It is well accepted that the terms 'interlocutory' and 'final' may mean different things in different contexts: *Malouf v Malouf* (1999) 167 ALR 383 at p 390. For the purposes of the above rule, it is clear that the determination of the separate question giving rise to the full court's costs award involved an interlocutory proceeding even though it resolved a discrete issue in the litigation: *Stack v Brisbane City Council* (1996) 71 FCR 523. It was not a proceeding in which 'the entire action [was] concluded by a judgment or order that authoritatively determine[d] [the] rights and obligations of the parties': ibid, at p 535. Mr O'Neill not having sought an order to the contrary when the full court order was made, he would require leave before proceeding to tax those costs. For reasons I give below I do not find it necessary to consider (a) whether the effect of a grant of leave to Mr O'Neill would so 'kill [the] action: *Covell Matthews & Partners v French Wools Ltd* [1978] 1 WLR 1477 at p 1487; as of itself to preclude his later seeking to enforce a costs order in that action: cf the position of the party against whom the discontinuance is made: *Newcomen v Coulson* (1876) 7 Ch D 764; or (b) whether the application for leave itself should be treated as an election to forego the benefit of the earlier costs award if leave is given.

15 (5) While the written submissions put in by both parties are laced with factual materials and allegations of fact, I have no evidence in appropriate form before me relating to the application for leave. Importantly, there is no evidence indicating such reasons as may have existed for Mr O'Neill's seeking leave to discontinue, although one can readily speculate as to what those reasons might be. Without suggesting that any of the following were Mr O'Neill's actual reasons, possible reasons could range, for example, from acceptance that the further prosecution of a proceeding of this type by a judicial officer was inappropriate in the circumstances irrespective of any defence of absolute privilege: cf *Mann v O'Neill* (1997) 191 CLR 204 at p 236; to a view entertained as to the likelihood of success in the proceeding particularly in light of the defence of qualified privilege; or simply to litigation exhaustion: cf *Stratford (JT) & Son Ltd v Lindley (No 2)* [1969] 1 WLR 1547. The point to be emphasised is that the absence of explanation by Mr O'Neil has some real bearing, as will be seen, on the direction I am to excise in the matter.

16 It is in my view clear that it is in the interests both of the parties and of the justice system itself that this protracted litigation be terminated and that Mr O'Neill be given leave to discontinue it. This said, the case is one that warrants the imposition of terms as a condition of the grant of leave.

[36] The position in India is that this general rule is subject to the provisions of O 1 r 10 In *Anil Kumar Singh v Shivnath Mishra* (1995) 3 SCC 147, Supreme Court interpreted O 1 r 10(2) in the following manner:

By operation of the above-quoted rule though the court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the court must be satisfied that the presence of the party to be added, would be necessary in order to enable the court

to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party-defendant is not a substantive right but one of procedure and the court has discretion in its proper exercise. The object of the rule is to bring on 3 record all the persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings.

[37] The theory of *dominus litis* should not be over-stretched because it is the duty of the court to ensure that if for deciding the real matter in dispute, a person is necessary party, the court can order such persons to be impleaded. Merely because the plaintiff does not choose to implead a person, is not sufficient for rejection of an application for being impleaded.

[38] In *Ramesh Hirachand Kundammal v Municipal Corporation of Greater Bombay* [1992] 2 SCR 1 Supreme Court discussed the matter at length and held that though the plaintiff is a 'dominus litis' and not bound to sue every possible adverse claimant in the same suit, the court may at any stage of the suit direct addition of parties and generally it is a matter of judicial discretion which is to be exercised in view of the facts and circumstances of a particular case. The court said: 'The case really turns on the true construction of the rule in particular the meaning of the words 'whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit'.

[39] O 1 r 10 of the Code of Civil Procedure enables the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of multiplicity of proceedings is also one of the objects of the said provision in the Code. The court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot under the rule direct, the addition of a person whose presence is not necessary for that purpose. If the intervener has a cause of action against the plaintiff relating to the subject matter of the existing action, the court has power to join the intervener so as to give effect to the primary object of the order which is to avoid multiplicity of actions. Though four prevention of actions cannot be said to be main object of the rule, it is a desirable consequence of the rule. The test for impleading parties prescribed in *Razia Begum v Sahebzadi Anwar Begum & Others* [1959] SCR 1111 that the person concerned must be having a direct interest in the action was reiterated by the bench.

[40] Coming back to our instant appeal, there are a few undisputed facts:

(a) the pleadings have closed;

(b) all parties are to prepare the relevant cause papers including pleadings, case summaries, bundle of documents, witness statements, list of witnesses etc;

(c) all application to amend pleadings at this stage must be only by leave of the court;

(d) trial dates have been set down; and

(e) sufficient time was given to all parties.

[41] The principles of law that this court keeps in mind are as follows:

(a) if a defendant is *dominus litis*, the general rule is to refuse leave to discontinue;

(b) the case is not at an advanced stage; if so, care must be taken not to permit discontinuance. What constitutes an advanced stage depends on the facts and circumstances of the case;

(c) the plaintiff may have gained an interim interlocutory advantage between the date of issue of the writ and the point of time he seeks to discontinue;

(d) there is no miscarriage of justice occasioned by its refusal to permit the discontinuance; and

(e) it will not prejudice the opponent to the application or take away from him any advantage to which he is fairly and reasonably entitled.

[42] It is my considered view that the plaintiff is indeed now a 'dominus litis', and has undue advantage, having seen all the defendant's cards on the table.

[43] To allow the plaintiff, withdrawal with liberty to file afresh, means that the plaintiff may make good, any earlier deficiency in his case, much to the disadvantage of the defendant because in a new trial, all pleadings are fresh and the parties are not bound to follow the pleadings of the earlier trial (since discontinued), much less leave of court.

[44] The defendant on the other hand, will have to wait until the new statement of claim is served on them to know what they need to reply to, putting them at a tactical disadvantage.

[45] Taking the cue in *Majlis Peguam Malaysia & Ors v Raja Segaran a/l S Krishnan*, I find that the learned magistrate was right in her decision.

CONCLUSION

[46] For the reasons aforesaid, I find no appealable error in the decision of the learned magistrate. I affirmed her decision and dismissed this appeal with costs.

[47] Dated at Johor Bahru this 9 June 2020.

Appeal dismissed with costs.

Reported by Nabilah Syahida Abdullah Salleh